BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHRISTINE L. STEGMAN	)	
Claimant	)	
v.	)	
	)	Docket No. 1,066,768
O'REILLY AUTOMOTIVE, INC.	)	
Respondent	)	
and	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the June 25, 2015, Award by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The only issue raised before the ALJ was whether claimant is entitled to future medical benefits, which the ALJ decided in claimant's favor.

Respondent requests reversal and argues claimant did not prove it is more probably true than not that additional medical treatment is necessary pursuant to K.S.A. 44-510h(e).

Claimant's attorney did not submit a brief.

The sole issue is whether claimant is entitled to future medical benefits.

FINDINGS OF FACT

Claimant did not testify. While moving batteries on June 13, 2013, claimant felt pain in her lower back radiating down her left leg. Claimant's leg pain progressed and she reported her injury a few days later.

John M. Ciccarelli, M.D. examined claimant on February 13, 2014, and on April 14, 2014, he performed a bilateral partial lumbar laminectomy at L5 and S1, a diskectomy on the left side at L5-S1 and a bilateral lateral recess decompression at L5-S1.

Dr. Ciccarelli provided claimant postoperative care with pain medications, a muscle relaxer and gradual return to activities with limitations following her 10 to 12 week recovery. Dr. Ciccarelli did not provide claimant formal therapy but recommended home exercises.

On July 17, 2014, Dr. Ciccarelli indicated claimant was at maximum medical improvement (MMI) and allowed her to return to ordinary work duties without restrictions. She reported intermittent back soreness, but it did not limit her.

Dr. Ciccarelli testified that when he last saw claimant, she still took a muscle relaxant and an occasional pain pill. The doctor testified claimant took cyclobenzaprine, a muscle relaxant prescribed before Dr. Ciccarelli treated her; hydrocodone, a pain pill; Naprosyn, an anti-inflammatory prescribed before Dr. Ciccarelli treated her; and Norco, a bigger dose of hydrocodone. Hydrocodone, and cyclobenzaprine are prescription medications and Naprosyn is over-the-counter. Dr. Ciccarelli's notes do not indicate he provided refills that day, so he did not know if claimant still actively took the medications.

Dr. Ciccarelli does not typically recommend ongoing or long-term pain management for postoperative patients, and his patients do not typically require the long-term referral.

Dr. Ciccarelli counseled claimant there is a 3 to 18 percent risk of reherniation following the procedures she underwent. Dr. Ciccarelli testified that when he released claimant, he anticipated no additional future medical treatment as a result of her disk herniation and surgery. The basis for that opinion was what he sees in his clinical practice, as well as his direct observations and experience with the patients he operates on. When asked about this, the doctor testified:

> Q. So your opinion that she won't need future medical treatment is based on just a whole your - - what you've experienced in the past regarding patients that have undergone this procedure and whether they need treatment in the future?
>
> A. Yes.[1]

[1] Ciccarelli Depo. at 15.

If claimant complained of ongoing pain at level 4 to 5 out of 10, Dr. Ciccarelli testified he would need to evaluate claimant to determine the type and location of the pain and if treatment would be needed. Dr. Ciccarelli testified he has patients rate their pain on the initial evaluation, but does not do a follow-up pain scale assessment when the patient is released.

Dr. Ciccarelli indicated he has not been contacted by claimant for re-evaluation or concerning additional symptoms. Dr. Ciccarelli felt claimant made a good recovery from her surgery or he would have made different treatment recommendations for her. She might need future medical treatment if an injury caused reherniation or if reherniation appeared from nonidentifiable causes. However, at the time he released claimant, Dr. Ciccarelli did not think claimant needed medical treatment including diagnostic testing, referral to another doctor, injections, or a TENS unit.

Aly Gadalla, M.D., board certified in internal medicine, evaluated claimant on February 13, 2015. Dr. Gadalla examined claimant and reviewed medical records related to her accident. When Dr. Gadalla saw claimant, she was still taking pain medications, Tylenol and Ibuprofen for her injuries.

Dr. Gadalla's examination showed claimant had mild to moderate muscle spasms, mild dysfunction in her sacroiliac joints and diffuse tenderness along her hips and lower back. Claimant reported intermittent low back pain at level 4 out of 5.

Dr. Gadalla's diagnosis was status post bilateral partial laminectomy at L5 and bilateral partial laminectomy at S1, status post bilateral lateral recess decompression at L5 and S1, lumbar diskectomy on the left L5 and S1, bilateral sacroiliac joint dysfunction, and lumbar muscle spasms.

Dr. Gadalla testified:

> My thoughts were that she was fairly - - fairly doing well after the surgery and she was just using the over-the-counter medications, so future medical care will - - or might, include some anti-inflammatories, as Mobic or Ibuprofen like she was taking, along with some muscle relaxants, as Flexeril or Skelaxin. And if her pain is not controlled by medications, sacroiliac joint steroid injections might be considered. If her pain won't be controlled by just the aforementioned medications, then we can consider sacroiliac joint steroid injections to help with the low back pain and the muscle spasms. And if her pain worsens and cannot be controlled by all of the above, like the medications and injections, then she would likely need an MRI to evaluate to see exactly whether any new pathology had emerged or not. And if that is the case and she's still experiencing worsening of her pain, it wouldn't be unreasonable for her to go see a surgeon or the surgeon who operated on her to just assess the repair site and re-evaluate the level he operated on. Sometimes after the laminectomy you get some weakness in the level above or below the level

> you operated on, and that would be my thinking of why she would have unexplained pain, but that was - - usually the MRI can tell us.[2]

Dr. Gadalla indicated claimant's intermittent pain might continue in the future, but then testified it is more likely than not, meaning 51 percent or more likely claimant will have pain in the future. Dr. Gadalla confirmed claimant is only 46 and will have another 30 to 40 years to live with the problem. The doctor indicated that at a minimum claimant would need over-the-counter medications, such as Tylenol or ibuprofen, However those medications can cause stomach problems or kidney dysfunction. If claimant switched to a TENS unit, it would reduce the risks associated with the over-the-counter medications. If claimant's pain recurs and over-the-counter medications and a TENS unit fail, the doctor recommended epidural injections.

Dr. Gadalla testified that even though he used the term "may" be necessary "if" this happens, it is more likely than not, future treatment will be necessary for claimant. The doctor agreed the future medical treatment he recommended would only be needed if claimant's condition worsened or she had increased symptoms.

The ALJ found, as noted above, claimant is entitled to future medical benefits. In the Award, the ALJ stated:

> There is a conflict between the two pertinent parts of the statute, and the applicable standards for the Court to apply. According to 44-510h(a), the employer has a duty to provide a health care provider "reasonably necessary" to cure and relieve the effects of the injury. In 44-510h(e) the employers duty to provide treatment is terminated upon the Claimant's reaching maximum medical improvement absent a showing by the Claimant that it is "more probably true than not" that additional medical treatment will be necessary.
>
> The Court notes that the term "maximum medical improvement" is not defined in Kansas Statutes or in the AMA guides 4th edition. It is a fluid concept, with different meanings within different jurisdictions and medical/legal structures, including medicare. What is clear to the Court is that the term maximum medical improvement has no relationship or bearing on whether or not a person currently needs medical treatment or may in the future. It is an arbitrary moment in time. The use of the term as a triggering event to discontinue future medical treatment has no rational basis and is in conflict with the purpose of the workers compensation act. For example, in this case, according to Dr. Ciccarelli, the Claimant has a 3% to 18% chance of a recurrence attributable to her work injury. Therefore, it is not "more probably true than not" that the Claimant will need future medical treatment. If in the event, Claimant is one of the 3% to 18% who has a need for future medical treatment[,] causally related to her work injury, and the Court were to apply the more probably true than not standard terminating her future medical benefits, the

[2] Gadalla Depo. at 9-10.

clear command of K.S.A. 44-510h(a) to provide reasonably necessary treatment to cure and relieve the effects of the injury would be abridged.

The Court finds the opinion of Dr. [Gadalla] to be more persuasive. The Court awards future medical to the Claimant upon proper application. Dr. Ciccarelli is a well known orthopedic surgeon in which the Court has a great deal of faith. However, he is not known for a pain management practice, as Dr. [Gadalla] is, and this is precisely the kind of treatment that the Claimant is likely to need in the future.[3]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-510h, in part, states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

. . .

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Claimant has the burden of proving her need for future medical treatment. Based on the entire record, the Board agrees with respondent's arguments that claimant did not carry such burden.

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[3] ALJ Award at 4-5.

A treating doctor's opinion often is afforded deference over an opinion of a hired independent medical examiner based on the opportunity to assess an injured worker on many occasions over a longer period of time, as compared to an independent medical examiner typically evaluating a claimant on one occasion.[4] This is one of those instances. Dr. Ciccarelli was the treating physician and evaluated claimant many times over several months. Dr. Ciccarelli opined claimant did not need further medical treatment. His statement that claimant faces a 3 to18 percent risk of reherniation does not establish that she will likely need additional medical treatment in the future.

Dr. Gadalla evaluated claimant once at her attorney's request. Dr. Gadalla's opinion regarding future medical treatment, when read as a whole and not isolating testimony only favorable to claimant, only establishes the possibility – but not the probability – claimant will need additional medical treatment. While he stated claimant will most likely need future medical treatment, his testimony is rife with qualifying language, i.e., multiple instances of "if" and "might" that tend to show only a possible need for future medical treatment, not a probable need. The doctor's opinion also hinged on claimant worsening in the future, a contingency he admitted may never occur.

The ALJ's Award comments on what he viewed as a conflict between K.S.A. 2013 Supp. 44-510h(a) and K.S.A. 2013 Supp. 44-510h(e). The underlying Award suggests there is no rational basis to use MMI as a marker to determine if an injured worker is entitled to future medical treatment and doing so conflicts with the purpose of the Kansas Workers Compensation Act. Neither the Board nor the ALJ has the task of determining whether a statute passes a rational basis test. Further, we are required to interpret statutes as written.[5] It is difficult to say the KWCA conflicts with its written intent.

CONCLUSION

The Board finds claimant failed to rebut the presumption that she does not need medical treatment after reaching MMI.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 25, 2015, is reversed.

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[4] E.g., *Wilson v. Staffpoint, LLC*, No. 1,059,043, 2015 WL 4071474 (Kan. WCAB June 9, 2015); *Jewell v. Specialty Hospital of Mid-America*, No. 1,062,706, 2014 WL 6863030 (Kan. WCAB Nov. 19, 2014); *Mahoney v. APAC Kansas, Inc.*, No. 1,062,178, 2014 WL 3055455 (Kan. WCAB June 26, 2014).

[5] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge